UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 64

Docket No. CH-0752-10-0624-I-1

Kevin Gray,

Appellant,

v.

Department of Defense,

Agency.

June 17, 2011

Phillip R. Kete, Esquire, Washington, D.C., for the appellant.

Cynthia C. Cummings, Esquire, Columbus, Ohio, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision sustaining his removal for off-duty criminal misconduct. For the reasons set forth below, we REVERSE the initial decision in part.[1] The removal action is NOT SUSTAINED.

[1] The appellant alleged below that the agency discriminated against him based on his sex (male) and race (African-American) and retaliated against him for engaging in protected equal employment opportunity activity. The administrative judge found that the appellant failed to prove any of these affirmative defenses by preponderant evidence, and the appellant has not challenged these findings on petition for review.

BACKGROUND

¶2 The appellant, an Internal Review Auditor with the Defense Finance and Accounting Service, was indicted by the Franklin County Court of Common Pleas grand jury on multiple counts of conspiracy, corrupt activity, theft, money laundering, and receipt of stolen property.[2] Initial Appeal File (IAF), Tab 7, Subtabs 4A, 4N. He pled guilty to two felony counts of receiving stolen property, and subsequently was convicted of these charges. *Id.*, Subtabs 3C, 4F, Subtab 4N at 6, 9. The agency proposed to remove the appellant based upon his felony criminal conviction. IAF, Tab 7, Subtab 4E. Deciding Official Stephen Borushko issued a decision notice sustaining the charge and finding that a nexus exists between the appellant's off-duty criminal misconduct and his ability to perform his duties, and that the penalty of removal was appropriate. *Id.*, Subtab 4B.

¶3 The appellant timely filed a Board appeal of the removal action, alleging discrimination based on race and sex, and retaliation for engaging in equal employment opportunity activity. IAF, Tab 1, Tab 29 at 22-23. Among other things, he argued that Deciding Official Borushko considered information concerning his eligibility, as a convicted felon, to maintain his non-critical sensitive position without providing advance notice of this matter, and that such consideration violated the appellant's due process rights. The appellant further argued, in the alternative, that, by Deciding Official Borushko's actions, the agency committed harmful procedural error that substantially prejudiced his rights. IAF, Tab 29 at 19-21.

We therefore do not consider these issues further and AFFIRM the initial decision regarding these affirmative defenses.

[2] The appellant's indictment arose from his alleged participation in a mortgage fraud scheme. IAF, Tab 7, Subtabs 4I, 4L, 4M.

¶4 After holding a hearing, the administrative judge sustained the removal action. IAF, Tab 38, Initial Decision (ID) at 1, 15. She sustained the charge and found that the appellant failed to prove his affirmative defenses of race and sex discrimination and retaliation. ID at 3, 9-12. Further, the administrative judge found that the appellant failed to prove a violation of his due process rights or, alternatively, harmful error. ID at 5-8. Additionally, she found that the agency established a nexus between the sustained misconduct and the efficiency of the service, and that the penalty of removal was reasonable. ID at 4-5, 12-15. The appellant filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency responded in opposition. PFR File, Tab 4.

ANALYSIS

The appellant's removal must be reversed because the agency violated the appellant's constitutional right to due process as explained in the Federal Circuit's recent *Ward* decision.

¶5 In its recent decision in *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), issued after the initial decision in this case, our reviewing court held that an appellant's constitutional due process rights may be violated if a deciding official considered new and material information when deciding whether to impose an enhanced penalty. In *Ward*, the Federal Circuit held that if an employee has not been given "notice of any aggravating factors supporting an enhanced penalty[,]" an ex parte communication with the deciding official regarding such factors may constitute a due process violation. *Ward*, 634 F.3d at 1280. In determining whether to find a due process violation, the Board must consider the facts and circumstances of each particular case. *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999).

¶6 Not every ex parte communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the claimant to an entirely new administrative proceeding; rather, only ex parte communications that introduce new and material information to the

deciding official will violate the due process guarantee of notice. *Ward*, 634 F.3d at 1279; *Stone*, 179 F.3d at 1376-77. The introduction of new and material information by means of ex parte communications to the deciding official undermines the public employee's constitutional due process guarantee of notice and the opportunity to respond. *Stone*, 179 F.3d at 1377. When deciding officials receive such ex parte communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. *Id.*

¶7 Ultimately, the inquiry of the Board is whether the ex parte communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances. *Ward*, 634 F.3d at 1279; *Stone*, 179 F.3d at 1377. The Board will consider the following factors, among others, to determine whether an ex parte contact is constitutionally impermissible: (1) whether the ex parte communication merely introduces "cumulative" information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377. Our reviewing court made clear that if the deciding official received new and material information by means of ex parte communications, thereby violating an employee's due process rights, the violation is not subject to the harmless error test; instead, the employee is automatically entitled to an "entirely new" and "constitutionally correct" removal proceeding. *Ward*, 634 F.3d at 1279; *see Stone*, 179 F.3d at 1377. The Board may not excuse the constitutional violation as harmless error. *Ward*, 634 F.3d at 1280.

¶8 On review, the appellant disagrees with the administrative judge's finding that the agency fulfilled its due process requirements with respect to "the deciding official's actions in questioning whether the appellant could occupy a

non-critical sensitive position." PFR File, Tab 1 at 47-48; ID at 6-7. It is unclear whether the administrative judge specifically found that Deciding Official Borushko considered information about the appellant's eligibility to maintain his sensitive position in imposing the penalty of removal.[3] Based upon our review of the record, however, we find that the deciding official did consider this information.

¶9 It is undisputed that, upon receiving the appellant's response to the proposal notice, Deciding Official Borushko e-mailed Joe Oshinski, Personnel Security Specialist, asking whether the appellant, a convicted felon, would be able to maintain his sensitive position. IAF, Tab 29 at 85. On April 6, 2010, Mr. Oshinski provided the deciding official with a summary of the applicable Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, and informed him that the appellant's convictions would raise serious security concerns that most likely would be disqualifying, i.e., lead to revocation of the appellant's eligibility to occupy a sensitive position, but that the revocation decision would be made by the Washington Headquarters Service, Central Adjudication Facility. *Id.* at 84-85. During the hearing and in his answers to the appellant's interrogatories, the deciding official admitted that he considered this information in deciding to remove the appellant and

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[3] The administrative judge noted that the ultimate decision to revoke the appellant's eligibility to occupy a non-critical sensitive position would be made by the Washington Headquarters Service, Central Adjudication facility, and that the Board had not yet issued a decision concerning its authority to review a decision that a tenured employee with adverse action appeal rights is ineligible to hold a non-critical sensitive position. ID at 6. (The Board has since decided that question, finding that it does have such authority. *See Conyers v. Department of Defense*, 115 M.S.P.R. 572 (2010), and *Northover v. Department of Defense*, 115 M.S.P.R. 451 (2010). However, the agency neither revoked the appellant's eligibility to occupy a non-critical sensitive position nor removed him for ineligibility to hold a non-critical sensitive position; rather, it removed him based upon his felony conviction. IAF, Tab 7, Subtabs 4B, 4E.

unintentionally omitted discussion of the matter from the decision notice. IAF, Tab 29 at 40, Tab 35 at 142-145, 152.

¶10 Further, the written record contains an April 7, 2010 e-mail that the deciding official sent to Employee Relations Specialist Katherine Murray, stating his decision to remove the appellant because of the appellant's guilty plea "would raise serious security concerns that would most likely lead to a revocation of his eligibility to occupy a sensitive position" and citing the applicable provisions of the Adjudicative Guidelines; it was understood that Ms. Murray would "flesh [out the e-mail notes] into a decision notice for [his] review and approval." IAF, Tab 29 at 88-89. Based on the weight of the evidence, we find that the deciding official considered information concerning the appellant's eligibility to maintain a sensitive position as a factor in imposing an enhanced penalty.

¶11 Applying the factors set forth in *Stone*, the information considered by the deciding official constitutes new rather than cumulative information. The agency does not contend, and the record evidence does not reflect, that the appellant was aware of this matter. Nor did the agency include this information in the proposal notice and thus, it cannot be considered cumulative. *See* IAF, Tab 7, Subtab 4E. Although there is no evidence that the information resulted in undue pressure on the deciding official to remove the appellant, our reviewing court emphasized in *Ward* that whether the additional information was of the type likely to result in undue pressure upon the deciding official is only one of the several enumerated factors and is not the ultimate inquiry in the *Stone* analysis. *Ward*, 634 F.3d at 1280 n.2. "[T]he lack of such undue pressure may be less relevant to determining when the ex parte communications deprived the employee of due process where . . . the [d]eciding [o]fficial admits that the *ex parte* communications influenced his penalty determination," making the "materiality of the *ex parte* communications . . . self-evident from the [d]eciding [o]fficial's admission." *Id.* Consequently, while there is no clear evidence of undue pressure, the materiality of the ex parte communications is self-evident from the deciding official's admission that he

considered the appellant's eligibility to maintain a sensitive position in deciding to remove him. *See* IAF, Tab 29 at 40, Tab 35 at 142-145, 152. Thus, the deciding official improperly considered new and material information by means of ex parte communications.

¶12 Based on the foregoing, we find that the deciding official's consideration of such aggravating factors without the appellant's knowledge was "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *See Stone*, 179 F.3d at 1377. Consequently, because the agency violated the appellant's due process guarantee to notice, the agency's error cannot be excused as harmless, and the appellant's removal must be cancelled. *See Ward*, 634 F.3d at 1280. The agency may not remove the appellant unless and until he is afforded a new "constitutionally correct removal procedure."[4] *See Stone*, 179 F.3d at 1377; *see also Ward*, 634 F.3d at 1280.

¶13 Accordingly, we REVERSE the initial decision in part and DO NOT SUSTAIN the removal action.[5] This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

ORDER

¶14 We ORDER the agency to cancel the removal action and to restore the appellant effective April 21, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

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[4] In reversing the appellant's removal, we make no findings with respect to the merits of the agency's charges.

[5] Based on our disposition, we need not address the appellant's other assertions raised on petition for review. For the same reason, any additional alleged errors did not affect the appellant's substantive rights.

¶15 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶16 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶17 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶18 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board’s decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board’s webpage at http://www.mspb.gov/mspbdecisionspage.html.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the Clerk of the Board.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.